DATO' MOHD. FATHI HJ. AHMAD

v.

DATO' DR. CHEN LIP KEONG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D3-22-1218-90]
21 JANUARY 1991

CIVIL PROCEDURE: *Discovery of documents - No allegation of wrongdoing against company - Connection with defendants - Failure to provide particulars - Striking out - Principles - Whether can restrain company from acting against debtor customers.*

The plaintiff, F, entered into an agreement to sell shares of the fifth defendant D5 to the first to fourth defendants, D1-D4 for RM53 million. There were substantial sums of money owing to D5 from some of its customers who were connected or controlled by F (the said customers). It was a term of the agreement that the purchasers were entitled to utilise a substantial part of the purchase price to settle the liabilities of the said customers, upon which payment D1 to D4 would release any securities that might have been deposited with D5 to secure the liabilities of the said customers to F. Although D1 to D4 alleged that they had settled the liabilities of the said customers, they have refused to give particulars to F and neither have they released any of the securities of the said customers to F.

D5 was placed in receivership and all its assets and liabilities were transferred to Arab Malaysia Finance Bhd. The receivers R have refused to provide the particulars sought by F saying that they are prevented from doing so because of the prohibition imposed by s. 97 of the Banking and Financial Institutions Act 1989 (the Act). F, in his claim for breach of contract and breach of trust against D1 to D4, seeks an order for the disclosure of this information, an order to restrain D5 from proceeding with actions against the said customers and damages against D5. Although no allegation of wrongdoing is made against D5, it is suggested that D5, since it was once controlled by D1 to D4, and having the accounts and the securities of the said customers, indirectly facilitated the wrongdoing of D1 to D4.

D5 then applied to strike out F's claim on the basis that the statement of claim does not disclose a reasonable cause of action against D5 and that joining D5 was vexatious and an abuse of process.

Held:

[1] Although the right to discovery or inspection must have some foundation and must depend on some other right, in special circumstances, an action for discovery alone can assist.

[2](a) As F alleges in his statement of claim that D1 to D4 have done wrong and that D5 has information that will enable F to prove the wrong against D1 to D4 and the fact that D5 has securities that should be given to F, the Court disallowed D5's application to strike out F's claim;

(b) however, the Court expunged that part of F's claim which sought to restrain D5 from proceeding with actions against the said customers as the securities of the said customers belong to them and have to be returned to them.

[Order accordingly.]

Cases referred to:
Shaw v. Smith [1886] 18 QBD 193
Norwich Pharmacal Co. v. Commissioners of Customs & Excise [1973] 2 All ER 943

Legislation referred to:
Banking and Financial Institution Act 1989, s. 97
Rules of the High Court 1980, O. 18 r. 19

For the Plaintiff/Respondent - K.S. Narayanan; M/s. K.S. Narayanan Associates
For the 5th Defendant/Applicant - N. Navaratnam; M/s. Shearn Delamore & Co.

JUDGMENT

VC George J:

This is an application by the 5th defendant company brought pursuant to O. 18 r. 19 of the Rules of the High Court 1980 and also by invoking the inherent jurisdiction of the Court to have the claim against the 5th defendant summarily struck out primarily on the ground that the statement of claim does not disclose a reasonable cause of action against the 5th defendant it also being in effect claimed that bringing in the 5th defendant into the action is vexatious and an abuse of the process.

There was an agreement entered into between the plaintiff and the 1st to the 4th defendants by which the plaintiff, who claimed to be the beneficial owner of almost all the 12,000,000 issued and paid up shares of First Malaysia Finance Berhad, formerly known as Central Malaysia Finance Berhad, sold those shares to the 1st to the 4th defendants for some RM53 million.

It was accepted between the parties, and as was acknowledged in the agreement, that there were substantial sums of money owing to the company from certain of its customers whose names were set out in a schedule to the agreement referred to as annexure K. It was in effect accepted by the parties to the agreement that these customers were connected to or were controlled by the plaintiff vendor. It was a term of the sale and purchase agreement that the purchasers were entitled to utilise a substantial part of the purchase price to settle the said liabilities of the annexure K customers. The 1st to the 4th defendants who were to forthwith take control of the company agreed that upon any such paying off of the liabilities of any of the annexure K customers they would forthwith release any securities that might have been deposited with the company to secure the liabilities of such annexure K customers, to the plaintiff.

Apparently the 1st to the 4th defendants say that they had applied a substantial portion of the purchase price to settle the liabilities of some of those annexure K customers. However, they have refused to give particulars thereof to the plaintiff. Neither they nor the 5th defendant have released any of the securities of the annexure K customers to the plaintiff.

Because of the intervention of Bank Negara the control of the company is now in hands other than that of the 1st to the 4th defendants: the company was put into the hands of receivers who have with the sanction of the Court transferred all the assets of the company to Arab Malaysian Finance Berhad who have also assumed the company's liabilities. The receivers have refused to give the particulars sought by the plaintiff saying that they are prevented from providing the information in respect of the annexure K customers to the plaintiff because of the prohibition imposed by s. 97 of the Banking and Financial Institutions Act 1989.

It seems to me that primarily, the plaintiff's claim against the 5th defendant company is an action for discovery. He also seeks an order to restrain the company from proceeding with actions against the annexure K customers and also seeks damages against the 5th defendant.

The right to discovery or inspection must have some foundation and must depend on some other right - *Shaw v. Smith* [1886] 18 QBD 193. However in *Norwich Pharmacal Co. v. Commissioners of Customs & Excise* [1973] 2 All ER 943 the House of Lords held that in the special circumstances of that case an action for discovery alone can exist. The effect of that case is explained in the 1988 White Book at 24/1/4 as follows:

> An action for discovery alone does not lie against a defendant who is not himself a wrongdoer and has no connection with the wrong-doing. Where a defendant through no fault of his own (and whether voluntarily or not) 'has got mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoers'.

In the instant case I do not think that anybody has, up to now, been accused of tortious acts. However wrongdoing by way of breach of contract and what could be breach of trust on the part of the 1st to the 4th defendants is alleged. No allegation of wrong-doing is seriously made against the 5th defendant company save the accusation that it is holding on to securities that should be handed over to the plaintiff. However and in any event it is suggested in the statement of claim that the 5th defendant albeit through no fault of its own has, by being a company once controlled by the 1st to the 4th defendants and having the accounts and the securities of the annexure K customers, got mixed up in the wrong-doing of the 1st to the 4th defendants and indirectly can be said to have facilitated such wrong-doing.

In the circumstances I am constrained to the view that the situation here is more of a *Norwich Pharmacal Co.* situation than a *Shaw v. Smith* situation.

Accordingly in the face of the plaintiff saying as he does by his statement of claim that the 1st to the 4th defendants have done wrong and that the 5th defendant has information that will enable the plaintiff to bring home the wrong to the 1st to the 4th defendants and that in any event the 5th defendant has securities that should be given to the plaintiff, I do not think that I should accede to the invitation by the 5th defendant to summarily have the claim as against the 5th defendant struck off - at least in respect of the prayers set out in para. 17A(1) of the statement of claim. However I fail to see any basis at all for the order sought in the plaintiff's para. 17A(2).

Now, there may be any number of defences available to the 5th defendant including the defence provided by s. 97 if En. N. Navaratnam's understanding of that section is correct and that whatever may be the terms and conditions of the agreement between the plaintiff and the 1st to the 4th defendants, the securities of the annexure K customers belong to them and have to be returned to them.

These are defences which might put paid to the plaintiff's claim *vis-a-vis* the 5th defendant. But the fact that you have a good defence does not *per se* amount to the plaintiff not having a reasonable cause of action.

Accordingly para. 17A(2) is expunged from the statement of claim as being frivolous or vexatious. I need hardly say it but to avoid any misunderstanding I would say that the allowing of para. 17A(1) to remain in the statement of claim is without prejudice to any and all defences available including the right of the 5th defendant to invoke s. 97 of the Banking and Financial Institutions Act as a defence.

The costs of and incidental to this application encl. (9) will be costs in the cause without prejudice to any application there might be for a Bullock Order.

Also found at [1991] 2 CLJ 1152